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Supreme Court, U.S.
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No. 03-____

IN THE

Supreme Court of the United States

Sabate S.A. and Sabate U.S.A., Inc.,
Petitioners,

v.

Chateau des Charmes Wines Ltd.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United Nations Convention on Contracts for the International Sale of Goods invalidates terms set forth in a commercial invoice or letter of confirmation without regard to the practices of the parties or trade usages.

RULE 29.6 STATEMENT

The successor to petitioner Sabate S.A. by merger and subsequent change of name is Oeneo S.A. Petitioner Sabate U.S.A., Inc. is a wholly owned subsidiary of Oeneo S.A.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is reported at 328 F.3d 528. The opinion of the district court (App., *infra*, 7a-18a) is unpublished.

JURISDICTION

The court of appeals' judgment was entered on May 5, 2003. A timely petition for rehearing en banc was denied on June 26, 2003 (App., *infra*, 19a-20a). This court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the United Nations Convention on Contracts for the International Sale of Goods, 15 U.S.C. App. (Pub. Notice 1004), are reproduced at App., *infra*, 21a-23a.

STATEMENT

This case presents fundamental questions regarding the construction of the single most important treaty governing the sale of goods in international commerce. The United States and more than sixty other countries, representing more than two-thirds of all world trade valued at trillions of dollars each year, have ratified the United Nations Convention on Contracts for the International Sale of Goods (CISG). See 15 U.S.C. App. (Pub. Notice 1004). This case presents a basic question regarding a frequently recurring scenario under the CISG: when an order for goods is followed by a written invoice or letter of confirmation, are standard terms and conditions set forth in the invoice or confirmation nonetheless invalid? That question in turn raises the most fundamental and frequently recurring interpretative question under the Convention: is a contract (here, the order) limited to its

express terms or instead construed in light of trade usages and all the facts and circumstances of the parties' relationship?

In this case, respondent placed oral orders from petitioners[1] for more than a million wine closures. Petitioners in turn transmitted numerous invoices for the sales, which respondent paid. But the Ninth Circuit held as a matter of law that the existence of an initial oral agreement invalidated any material terms subsequently set forth in the invoices notwithstanding trade usage or the circumstances of the parties' relationship. The courts of numerous other CISG signatories have considered the question – including major trading partners such as France and Germany – and reached the opposite result, and thus would enforce the terms of the invoices in this case. The decision below also conflicts with the interpretation of the CISG by other U.S. courts, for the Eleventh Circuit and district courts have rejected the Ninth Circuit's formalistic approach to contract interpretation. Certiorari should be granted to fulfill the CISG's principal purpose of establishing "uniform rules which govern contracts for the international sale of goods" (CISG pmbl.) in order to eliminate "legal uncertainty" (Letter of Secretary of State Schultz Submitting the CISG to President Reagan (Aug. 30, 1983)).

1. This case involves the sale of goods between parties in France, Canada, and the United States, all of which are CISG signatories. Petitioners (a French company and its U.S. marketing subsidiary) manufacture and sell cork closures for bottled wine. Respondent (a Canadian company) produces and sells wine. In 2000, respondent placed two oral orders with petitioners for more than one million wine closures. Over the course of thirteen months, petitioners sent ten batches of closures and eleven invoices. Respondent in turn paid petitioners. Each of the invoices contained a prominently displayed forum-selection clause on the front, as

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[1] For simplicity, this petition will use the term "petitioners" throughout.

well as an instruction to see the reverse side of the invoice, which also contained a forum-selection clause. The parties' oral discussions addressed the number of closures, the price, and the shipment schedules, but not how any dispute would be resolved. Respondent never objected to any term of the invoices.

In 2001, respondent sued petitioners in federal district court in California alleging that the closures were "defective, unmerchantable, and unfit for the purposes" for which they were sold. Compl. ¶ 9. Respondent asserted, *inter alia*, a claim for breach of contract based on the parties' "oral agreements, supported by written invoices." *Id.* ¶ 52. Petitioners moved to dismiss the case as filed in the improper forum in light of the invoices' provision (as translated from French to English) that "[a]ny dispute arising under the present contract is under the sole jurisdiction of the Court of Commerce of the City of Perpignan" in France.

2. The district court agreed with petitioners and dismissed the case. Pet. App. 7a, 17a-18a. The court held that the dispute was governed by U.S. law, under which "[i]t is well-established that a non-negotiated forum selection clause included in a form contract may be enforced even if it was not the subject of bargaining." *Id.* 11a (citing *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991)). In any event, in light of the numerous invoices sent by petitioners to which respondent had never objected, the court found that "evidence of plaintiff's prior course of dealing with defendants establishes plaintiff's consent to the forum selection clause." *Id.* 12a.

On respondent's appeal, the Ninth Circuit reversed, holding that "the forum selection clauses * * * were not part of any agreement between the parties." Pet. App. 2a. The court of appeals recognized that under domestic law (specifically, under Article 2 of the Uniform Commercial Code) the parties did not reach an agreement until it was memorialized in the written invoices. *Id.* 5a n.3. But it held

that a different result was called for by the CISG, which governed the case because the contracts called for an international sale of goods and the parties were citizens of signatory nations. *Id.* 3a-4a. Further, the panel held, the CISG governed the question of when the contracts were formed. *Id.* 5a.

According to the Ninth Circuit, each oral order between petitioners and respondent formed a "complete and binding contract[]," for the parties addressed "the kind of cork, the quantity, and the price." Pet. App. 5a. The court of appeals found it dispositive that the oral agreements "did not include any forum selection clause," which the CISG deems a "'material[]'" term. *Id.* (quoting CISG art. 19(3)). Because respondent "merely performed its obligations under the oral contract," without affirmatively assenting to the additional material terms of the invoices, those terms were invalid. *Id.* 6a.

3. After the Ninth Circuit denied rehearing and rehearing *en banc*, this petition followed.

REASONS FOR GRANTING THE WRIT

The U.N. Convention on Contracts for the International Sale of Goods governs, as its name implies, contracts for the sale of goods in international trade between citizens of signatory states. CISG art. 1. The CISG sets forth, *inter alia*, standards for evaluating contract formation, modification, and interpretation. See, *e.g.*, *id.* arts. 14, 18, 29. In this case, the Ninth Circuit seriously misconstrued the Convention by holding as a matter of law that, if a contract has been formed, any material terms set forth in a subsequent invoice or letter of confirmation are invalid. On a proper construction of the CISG, the forum-selection clause in petitioners' invoices was valid because it formed a part of the parties' course of dealing. At the very least, petitioners were entitled to make a factual showing that such clauses were common in trade usage. The court of appeals' contrary holding conflicts with a

well-developed and thoroughly reasoned body of case law in other CISG signatory states, as well as the United States.

I. The Ninth Circuit Erred in Holding that the CISG Governs The Enforceability of the Forum-Selection Clauses in Petitioners' Invoices.

The Ninth Circuit's holding that the forum-selection clauses set forth in petitioners' invoices were unenforceable under the CISG because they were not included in the initial oral agreement between petitioners and respondent, and its further holding that respondent's failure to object to those clauses did not constitute acceptance, failed to account for Article 4(a) of the CISG. That Article provides that the Convention does not address "the validity of [a] contract or of any of its provisions or of any usage." Those matters are resolved by reference to *domestic* law rather than the CISG. See Harry M. Flechtner, *The U.N. Sales Convention (CISG) and MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova d'Agostino, S.P.A.: The Eleventh Circuit Weighs in on Interpretation, Subjective Intent, Procedural Limits to the Convention's Scope, and the Parol Evidence Rule*, 18 J.L. & Com. 259, 286 (1999). In this case, respondent contends that it is not bound by the forum-selection clauses because the invoices are invalid. Under Article 4 of CISG, that question of validity must be resolved according to U.S. domestic law.

Based on Article 4, the tribunals of other CISG signatories would hold that the validity of a writing containing a forum-selection clause is a question of domestic law. That was the holding of the court in *Inta S.A.* v. *MCS Officina Meccanica S.p.A.*, No. 45626 (Arg. Oct. 14, 1993). See Michael J. Bonell & Fabio Liguori, *The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law - 1997 (Part I)*, 2 Unif. L. Rev. 385 (1997). Similarly, the Dutch courts have held that the enforceability of a confirmation letter, including a forum-selection clause it contains, falls outside the purview of the CISG and is therefore a question of domestic law.

Handelskwekerij Aartsen BV v. *G. Suykens*, No. 1242 HAZA 95-934 (Zutphen (Neth.) May 29, 1997) (applying domestic law rather than CISG and finding forum-selection clause valid when "the parties already did business several times with each other in 1993, in which [one party] confirmed in writing to [the other party] the purchase agreements that had occurred orally").

Pursuant to Article 4, the forum-selection clause in this case is enforceable as a matter of U.S. law on either of two grounds. The Ninth Circuit recognized that under U.S. law the invoices would be enforced because U.S. law would require the contracts in this case to be in writing. Pet. App. 5a n.3. Alternatively, as the district court recognized, "[f]orum selection clauses are presumptively valid and will be enforced unless the party opposing the clause can 'clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.'" Pet. App. 10a (quoting *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)). The same rule applies to other dispute-resolution provisions such as arbitration clauses. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985).

In these respects, the Ninth Circuit's decision specifically conflicts with this Court's decision in *Mitsubishi Motors* and the Seventh Circuit's decision in *In re Oil Spill by Amoco Cadiz*, 659 F.2d 789, 795 (1981), both of which emphasized the particular importance of enforcing forum-selection clauses in international contracts. In *Mitsubishi Motors*, this Court rejected the respondent's argument that its antitrust claims against petitioner were not arbitrable, notwithstanding that an arbitration clause was part of the parties' agreement. In so holding, this Court explained that its conclusion was compelled by its "concern of international comity, respect for the capacity of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes * * * *even assuming that a contrary result would be forthcoming in a*

domestic context." 473 U.S. at 629 (emphasis added).

In *Amoco Cadiz*, a case arising out of ultimately unsuccessful efforts to prevent a massive oil spill, pursuant to which the parties had entered into a standard salvage agreement that included an arbitration clause, the court rejected the plaintiffs' argument that certain tort claims were not arbitrable absent a specific provision to that effect. The court similarly rejected the plaintiffs' argument that some claims were not arbitrable because they fell outside the temporal scope of the salvage agreement. The court explained that its "finding in favor of arbitration was bolstered by," *inter alia*, "the special deference owed to forum-selection clauses in international contracts." 659 F.2d at 795.

II. Even Assuming that the Validity of the Forum-Selection Clauses Is Governed By CISG, the Ninth Circuit's Holding Is Contrary to the Convention and Should Be Reviewed in This Court.

The Ninth Circuit's decision is erroneous even if, contrary to Article 4, the validity of petitioners' invoices were determined under the CISG. The court of appeals held that the contract in this case was limited to the specific terms of the parties' oral discussions. That holding conflicts with the text of the Convention, the views of the leading commentators, decisions from other signatory states, and U.S. case law.

A. The Decision Below Is Contrary to the Plain Text and the Understanding of the Leading CISG Commentators.

Contrary to the Ninth Circuit's decision in this case, the drafters and signatories of the CISG eschewed a formalistic approach to interpreting and enforcing contracts. The "dominant theme of the [CISG] is the role of the contract construed in light of commercial practice and usage." John O. Honnold, Uniform Law for International Sales Under the

1980 United Nations Convention 3 (3d ed. 1999). The Convention thus repeatedly specifies that the parties' agreement must be considered in light of "*all* relevant circumstances of the case including the negotiations, *any* practices which the parties have established between themselves, usages and *any* subsequent conduct of the parties." CISG art. 8(3) (emphases added). See also *id.* art. 9(1) ("The parties are bound by *any* usage to which they have agreed and by *any* practices which they have established between themselves." (emphases added)); *id.* art. 9(2) ("The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.").

Further, the terms of the contract are not limited to those explicitly or implicitly incorporated in the parties' initial agreement. Rather, the contract is subject to modification, including by payment of an invoice that sets forth particular terms. Although "[s]ilence or inactivity does not *in itself* amount to acceptance" of an offer or additional material term, "if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price * * * the acceptance is effective at the moment the act is performed." CISG art. 18 (emphasis added).

The Ninth Circuit nonetheless deemed it dispositive that a forum selection clause is a "material" term of a contract (Pet. App. 5a), which cannot be deemed accepted by mere "silence or inactivity" (CISG art. 18(1)). But as just noted, Article 18 specifically provides that "payment of the price" *is* sufficient to incorporate a material term. Professor Peter Schlechtriem

– perhaps the world's foremost authority on the CISG[2] – wrote in a report based on his contemporaneous notes of the Convention's drafting that "[e]xamples of such acts – which are considered equivalent to acceptance and thus mean that a contract is concluded – are the shipment of goods or payment of the price." Peter Schlechtriem, Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods 53 (1986). The "practices" of the parties thus "can include the effect of silence to a confirmation letter as assent to a conclusion or modification of the contract included in the letter." Michael Esser, *Commercial Letters of Confirmation in International Trade: Austrian, French, German and Swiss Law and Uniform Law under the 1980 Sales Convention*, 18 Ga. J. Int'l & Comp. L. 427, 449 (1988).

The fact that a forum-selection clause is a "material" term is thus "subject to an important clarification" that the Ninth Circuit ignored: "The Convention provides that the parties are considered * * * to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed, by parties to contracts of the type involved in the particular trade concerned." Kazuaki Sono, *Formation of International Contracts Under the Vienna Convention: A Shift Above the Comparative Law*, *in* International Sale of Goods: Dubrovnik Lectures 111, 126 (Petar Sarcevic & Paul Volken, eds., 1986). As the Secretariat Commentary – described by the Institute for International Commercial Law as "perhaps the most authoritative source one can cite" regarding the CISG – sets forth with respect to Article 18: silence or inactivity "can constitute acceptance" if "coupled with other factors which

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[2] The views of respected commentators such as these are given significant weight in international law generally and in interpretation of the CISG in particular. See Sunil R. Harjani, *The Convention on Contracts for the International Sale of Goods in United States Courts*, 23 Hous. J. Int'l L. 49, 61 (2000).

give sufficient assurance that the silence [or inactivity] of the offeree is an indication of assent," including on the basis of "any practices which the parties have established between themselves, usages, and any subsequent conduct of the parties." Commentary on the Draft Convention on Contracts for the International Sale of Goods Prepared by the Secretariat, U.N. Doc. A/Conf. 97/5, art. 16 [draft counterpart of CISG art. 18] ¶ 4 [hereinafter "Secretariat Commentary"], *reprinted in* Pace University Law School CISG Database.

Further, as Professor Kelso has explained, the "materiality" provision of Article 19 on which the Ninth Circuit rested its decision merely establishes a "*presumption* of materiality" that can be overcome in light of "the parties' intentions, previous practices and trade usages." J. Clark Kelso, Note, *The United Nations Convention on Contracts for the International Sale of Goods: Contract Formation and the Battle of the Forms*, 21 Colum. J. Transnat'l L. 529 (1983) (emphasis added). As Professor Schlechtriem explains, the presumption may be overcome: "given the special circumstances of the case, as well as party customs, negotiations, or usages, differences between offer and acceptance, even related to these points, may be considered as immaterial." Schlechtriem, *supra*, at 54 n.181.

B. Petitioners Would Prevail in the Tribunals of Other CISG Signatory States.

The Ninth Circuit's decision conflicts with the rulings of courts in other states that subscribe to the CISG and that faithfully apply the Convention's text and the drafters' intent. Prior to the decision in this case, it was settled that the material terms of a letter of confirmation or invoice, if not objected to, were incorporated into the parties' agreement. Foreign tribunals reached that conclusion because it is an accepted trade practice or usage to follow oral orders with invoices and confirmation letters. Thus, in *W.T. GmbH* v. *P. AG*, No. P4 1991/238 (ZG Basel, Switz. Dec. 21, 1992), the court held that under the CISG a subsequent confirmation

letter was binding with respect to a material term – the parties to the agreement – because "the letters of confirmation must have constituted a practice that the parties had established between themselves in the sense of Article 9(1) CISG" and, "[h]ad the defendant, after receipt of the confirmation letter of 24 February 1989, wished to have been understood by the [seller] to be in fact not a contractual partner but rather an agent, she would have had to inform the [seller] of this at that moment." And in No. 1 U69/92 (Oberlandesgericht Saarbrücken (Ger.) Jan. 13, 1993), the seller sent the buyer a confirmation letter that, as in this case, addressed the question of dispute resolution – there, the obligation to give prompt notice of any defects. The court held that the buyer agreed to the confirmation letter when it accepted the goods.

In *E.H.T.M. Peters* v. *Kulmbacher Spinnerei & Co. Produktions KG*, No. 456/95/He ('s Hertogenbosch Ct. App. (Neth.) Apr. 24, 1996), a seller sought to enforce general "terms and conditions" set forth on its "order confirmations" governing material terms such as interest and the place of delivery. The court held that these provisions were binding under the CISG because the parties had previously done business together "on a small scale" and the purchaser was therefore understood to be "aware of the fact that the [seller] used these general terms and conditions, [of] which [the purchaser] could have been aware from their context."

Even if a foreign tribunal did not find it dispositive that respondent paid without objection the eleven invoices in which petitioners had expressly included a forum-selection clause, it would at least remand for a determination whether the use of a forum-selection clause constitutes an accepted trade practice, whether generally or in the wine industry in particular. Thus, in No. 2 Ob 191/98x (Oberster Gerichtshof Oct. 15, 1998), Austria's highest court remanded for a determination whether trade usages applied to the parties' contract – there, usages in the timber trade – holding that "trade usages agreed between the parties, any practices established between the parties, as well as customs generally

known and observed in international trade prevail over the provisions of the CISG."

C. The Ninth Circuit's Opinion Conflicts With the Interpretations of the CISG By Other U.S. Courts.

Just as important, the decision below creates a conflict in U.S. authority regarding the interpretation of contracts governed by the CISG. As in this case, in *MCC-Marble Ceramic Center, Inc.* v. *Ceramica Nuova D'Agostino, S.P.A.*, 144 F.3d 1384 (CA11 1998), cert. denied, 526 U.S. 1087 (1999), the parties reached an oral agreement, then the seller executed an invoice governing the terms of dispute resolution, but the buyer claimed not to be bound by the invoice. The cases differ in that the buyer signed the invoice. But the legal issue resolved by the Eleventh Circuit was very similar, and its holding is irreconcilable with the Ninth Circuit's decision in this case. The Eleventh Circuit held that under the CISG the "intent of the parties" had to be resolved by giving "'due consideration * * * to all relevant circumstances of the case.'" *Id.* at 1389. In particular, "because [CISG] article 8 requires a court to consider any 'practices which the parties have established between themselves, usages and any subsequent conduct of the parties' in interpreting contracts * * * whether the parties intended to adhere to the ten day limit for complaints, as stated on the reverse of the initial contract, will have an impact on whether MCC was bound" by the invoice. *Id.* at 1392. Of particular note, as commentators have recognized, the Eleventh Circuit's decision "resisted the temptation to look to domestic case law and instead based its entire findings on the language contained in Article 8(1) and Article 8(3) of the CISG," as supported by "'the great weight of academic commentary,'" in order to further "the overriding need for uniformity and consistency in the interpretation of the CISG." Harjani, *supra*, at 1390 (quoting *MCC-Marble*, 144 F.3d at 1390).

Similarly, as in this case, in *Filanto, S.p.A.* v. *Chilewich Int'l Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992), one party (there, the buyer) sent a memorandum agreement that included a term regarding dispute resolution. The seller did not object for several months. To the contrary, as in this case, the seller affirmatively invoked the later document in its breach of contract suit. The court held that the memorandum agreement was binding, finding "no satisfactory explanation as to why [the seller] failed to object to the [memorandum agreement] in a timely fashion." *Id.* at 1240. The court in *Filanto* recognized that mere silence is not acceptance under the CISG, but it correctly held that "the Court may consider previous relations between the parties in assessing whether a party's conduct constituted acceptance." *Id.* Cf. *Magellan Int'l Corp.* v. *Salzgitter Handel GmbH*, 76 F. Supp. 2d 919, 925 (N.D. Ill. 1999) (buyer can assent to terms "through a statement made by or other conduct of the offeree").

III. The Ninth Circuit's Opinion Poses a Significant Threat to International Commerce.

The foregoing establishes that the Ninth Circuit committed a grave error of law in this case and created an important conflict regarding the construction of the CISG. The court of appeals held that once a contract has been formed (here, each of the oral agreements between petitioners and respondent), any additional material terms (here, the forum-selection clauses of petitioners' invoices) are categorically invalid. It makes no difference, under the Ninth Circuit's holding, that the forum-selection clauses were included in *numerous* separate invoices received and paid by respondent over the course of thirteen months, or that each invoice contained a prominently displayed forum-selection clause on the front of the invoice as well as an instruction to see the reverse side of the invoice. The district court properly found that respondent's "prior course of dealing with [petitioners] establishes [respondent's] consent to the forum selection clause." Indeed, respondent's own complaint

asserts a claim for breach of contract based on the "oral agreements, *supported by written invoices*." Pet. App. 11a (emphasis added). The court of appeals nevertheless reversed on the legal ground that, notwithstanding the express language of Article 18 of the CISG, payment of invoices is the equivalent of "silence," which is insufficient to signify acceptance. It furthermore makes no difference, under the Ninth Circuit's rule, that forum-selection clauses are routinely employed in international sales contracts generally, and the wine closure industry specifically, as petitioners would have shown had the court of appeals at least remanded the case for further proceedings.

The Ninth Circuit's erroneous construction of the CISG governs a significant number of cases because the factual circumstances of this case frequently recur. As this case illustrates, the practice of placing oral orders for goods is commonplace. Although oral discussions may (as in this case) address the minimum terms necessary to form a contract, experience demonstrates that such discussions rarely address every possible material term. The court of appeals' ruling furthermore governs not merely oral agreements but *any* contract that is followed by one party's articulation of a significant term. The decision below thus supplants the entire body of international commercial law governing the classic "battle of the forms" with an unsound and unwarranted *per se* rule.

Even limited to its narrowest possible application, the Ninth Circuit's decision will adversely affect completed and prospective contractual arrangements in a vast number of cases. This case specifically governs contract terms addressed to "the settlement of disputes" (Pet. App. 5a (quoting CISG art. 19(3))), which principally involve forum selection and the choice of arbitration over litigation. It is well settled under both U.S. and international commercial law that such terms are valid and enforceable, including when set forth in form documents such as invoices. See Pet. App. 11a-12a (citing *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585

(1991); *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972)); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Handelskwekerij Aartsen BV* v. *G. Suykens*, No. 1242 HAZA 95-934 (Zutphen (Neth.) Dist. Ct. May 29, 1997) ("Choosing a forum by applicability declaration in general terms and conditions for order confirmations is a form which is customary in international trade."). Importantly, such terms are almost never addressed by the contracting parties in oral discussions. Rather, as in this case, they are set forth in subsequent documents.

The widespread international acceptance and use of forum-selection and arbitration clauses are further important evidence that the Ninth Circuit's decision contravenes the intent of the signatories of the CISG. There is no evidence in the text or drafting history of any intent to so substantially depart from accepted means of contract formation and interpretation. To the contrary, there is every reason to believe that the CISG embodies the recognition that forum-selection clauses are "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction," such that refusal to enforce them would "damage the fabric of international commerce and trade." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974).

The Ninth Circuit's holding that the CISG invalidates dispute-resolution clauses in invoices and letters of confirmation furthermore deprives contracting parties of a valuable tool for managing disputes and reducing their costs. This Court has repeatedly acknowledged the utility of forum-selection clauses in eliminating the uncertainty regarding both the "law applicable to the resolution of disputes arising out of the contract" – disputes that will "almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules" (*Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 516 (1974)); and the fora in which such disputes may be brought (*Carnival*

Cruise Lines, Inc. v. *Shute*, 499 U.S. 585, 593 (1991) (noting that "[i]ncluding a reasonable forum clause in a form contract of this kind well may be permissible" because the cruise line could otherwise be "subject[ed] * * * to litigation in several different fora")).

Moreover, the effects of the Ninth Circuit's opinion extend beyond forum-selection clauses, as it creates the possibility that virtually all pre-printed terms and conditions commonly appearing on millions of invoices used in trade worldwide will be deemed invalid. Such terms and conditions may govern not only forum selection, but also other important terms of the transaction, such as warranties, payment terms, notice of defect provisions, arbitration clauses, retention of title provisions, non-conforming product return terms, shipping terms and conventions, the passing of risk, and insurance. As a result of the Ninth Circuit's opinion, unless international merchants spell out each and every term in their telephone calls or get signed, written contracts in every case, they can no longer rely on pre-printed terms and conditions appearing on invoices.

The Ninth Circuit's central geographic role in international trade further heightens the significance of its decision. The western states are a substantial source of international trade with Mexico, Canada, and the Pacific Rim. The decision below thus subjects tens of billions of dollars in trade to an erroneous and disruptive standard that deprives a contracting party of an important and accepted means of arranging for cost-effective means of dispute resolution.

Certiorari accordingly should be granted.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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September 24, 2003

CHATEAU DES CHARMES WINES LTD.,
Plaintiff-Appellant,
v.
SABATE USA INC., SABATE S.A.,
Defendants-Appellees.

No. 02-15727

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

328 F.3d 528; 2003 U.S. App. LEXIS 8478; 2003 Daily Journal DAR 4894

March 31, 2003, Argued and Submitted, San Francisco, California
May 5, 2003, Filed

COUNSEL: Benjamin M. Zuffranieri, Jr., Hodgson Russ LLP, Buffalo, New York, for the plaintiff-appellant.
David C. Winton, Law Office of David C. Winton, San Francisco, California, for the defendant-appellee.

JUDGES: Before: Betty B. Fletcher, Alex Kozinski, and Stephen S. Trott, Circuit Judges.

OPINION: PER CURIAM:

Chateau des Charmes Wines, Ltd. ("Chateau des Charmes"), a Canadian company, appeals the dismissal of its action for breach of contract and related claims arising out of its purchase of wine corks from Sabate, S.A. ("Sabate France"), a French company, and Sabate USA, Inc. ("Sabate USA"), a wholly owned California subsidiary. The district court held that forum selection clauses in the invoices that

Sabate France sent to Chateau des Charmes were part of the contract between the parties and dismissed the case in favor of adjudication in France. Because we conclude that the forum selection clauses in question were not part of any agreement between the parties, we reverse.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The material facts pertinent to this appeal are not disputed.[1] Sabate France manufactures and sells special wine corks that it claims will not cause wines to be spoiled by "cork taint," a distasteful flavor that some corks produce. It sells these corks through a wholly owned California subsidiary, Sabate USA.

In February 2000, after some preliminary discussions about the characteristics of Sabate's corks, Chateau des Charmes, a winery from Ontario, Canada, agreed by telephone with Sabate USA to purchase a certain number of corks at a specific price. The parties agreed on payment and shipping terms. No other terms were discussed, nor did the parties have any history of prior dealings. Later that year, Chateau des Charmes placed a second telephone order for corks on the same terms. In total, Chateau des Charmes ordered 1.2 million corks.

Sabate France shipped the corks to Canada in eleven shipments. For each shipment, Sabate France also sent an invoice. Some of the invoices arrived before the shipments, some with the shipments, and some after the shipments. On the face of each invoice was a paragraph in French that specified that "Any dispute arising under the present contract is under the sole jurisdiction of the Court of Commerce of the City of Perpignan." On the back of each invoice a number of provisions were printed in French, including a clause that specified that "any disputes arising out of this agreement shall

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[1] We, of course, do not determine the merits of Chateau des Charmes's claims against Sabate France and Sabate USA.

be brought before the court with jurisdiction to try the matter in the judicial district where Seller's registered office is located." Chateau des Charmes duly took delivery and paid for each shipment of corks. The corks were then used to bottle Chateau des Charmes' wines.

Chateau des Charmes claims that, in 2001, it noticed that the wine bottled with Sabate's corks was tainted by cork flavors. Chateau des Charmes filed suit in federal district court in California against Sabate France and Sabate USA alleging claims for breach of contract, strict liability, breach of warranty, false advertising, and unfair competition. Sabate France and Sabate USA filed a motion to dismiss based on the forum selection clauses. The district court held that the forum selection clauses were valid and enforceable and dismissed the action. This appeal ensued.

DISCUSSION

I.

Although we review a district court's decision to enforce a forum selection clause for abuse of discretion, *Kukje Hwajae Ins. Co., Ltd. v. M/V Hyundai Liberty*, 294 F.3d 1171, 1174 (9th Cir. 2002), whether the parties agreed to a forum selection clause is a question of law that we review de novo. *Cf. Helash v. Ballard*, 638 F.2d 74, 75 (9th Cir. 1980) (per curiam) (existence of contract based on undisputed facts is a question of law).[2]

The question before us is whether the forum selection clauses in Sabate France's invoices were part of any agreement between the parties. The disputes in this case arise out of an agreement for a sale of goods from a French party and a United States party to a Canadian party. Such international sales contracts are ordinarily governed by a multilateral treaty, the United Nations Convention on Contracts for the International Sale of Goods ("C.I.S.G."),

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[2] Whether we review under an abuse of discretion standard or a de novo standard, we reach the same conclusion.

which applies to "contracts of sale of goods between parties whose places of business are in different States . . . when the States are Contracting States." C.I.S.G., art. 1(1)(a), 15 U.S.C. App., 52 Fed. Reg. 6262 (March 2, 1987). The United States, Canada, and France are all contracting states to the C.I.S.G. 15 U.S.C. App. (Parties to the Convention). And none has acceded to the Convention subject to reservations that would affect its applicability in this case. Moreover, because the President submitted the Convention to the Senate, which ratified it, *see* Public Notice 1004, U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods: Official English Text, reprinted in 15 U.S.C. App.; Letter of Transmittal from President Reagan to the Senate of the United States (Sept. 21, 1983), reprinted in 15 U.S.C. App., there is no doubt that the Convention is valid and binding federal law. Accordingly, the Convention governs the substantive question of contract formation as to the forum selection clauses.

Our conclusion that the C.I.S.G. governs the issues in this appeal is not in conflict with authority from our sister circuits that have applied state law. Both the Second Circuit and the First Circuit have confronted the question of what law governs issues of contract formation that are antecedent to determining the validity of and enforcing forum selection clauses. In *Evolution Online Sys. Inc. v. Koninklijke Nederland N.V., KPN*, 145 F.3d 505, 509 (2d Cir. 1998), the Second Circuit applied New York law to a dispute between a Dutch company and a New York corporation regarding the production of computer software and the provision of technical services presumably because the Convention does not apply "to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services." C.I.S.G., art. 3(2). The First Circuit's decision in *Lambert v. Kysar*, 983 F.2d 1110, 1119 (1st Cir. 1993), involved the resolution of an interstate dispute that had no international dimension.

II.

Under the C.I.S.G., it is plain that the forum selection clauses were not part of any agreement between the parties. The Convention sets out a clear regime for analyzing international contracts for the sale of goods: "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form." C.I.S.G., art. 11. A proposal is an offer if it is sufficiently definite to "indicate[] the goods and expressly or implicitly fix[] or make[] provision for determining the quantity and the price," *id.*, art. 14, and it demonstrates an intention by the offeror to be bound if the proposal is accepted. *Id.* In turn, an offer is accepted if the offeree makes a "statement . . . or other conduct . . . indicating assent to an offer." *Id.*, art. 18. Further, "A contract is concluded at the moment when an acceptance of an offer becomes effective." *Id.*, art. 23. Within such a framework, the oral agreements between Sabate USA and Chateau des Charmes as to the kind of cork, the quantity, and the price were sufficient to create complete and binding contracts.[3]

The terms of those agreements did not include any forum selection clause. Indeed, Sabate France and Sabate USA do not contend that a forum selection clause was part of their oral agreements, but merely that the clauses in the invoices became part of a binding agreement. The logic of this contention is defective. Under the Convention, a "contract may be modified or terminated by the mere agreement of the parties." *Id.*, art. 29(1). However, the Convention clearly states that "[a]dditional or different terms relating, among other things, to . . . the settlement of disputes are considered to alter the terms of the offer materially." *Id.*, art. 19(3). There is no indication that Chateau des Charmes

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[3] In this respect, the regime of the C.I.S.G. differs from that of the Uniform Commercial Code, which would require a contract for the sale of corks for the value involved here to be evidenced by a writing. *See* U.C.C. § 2-201.

conducted itself in a manner that evidenced any affirmative assent to the forum selection clauses in the invoices. Rather, Chateau des Charmes merely performed its obligations under the oral contract.

Nothing in the Convention suggests that the failure to object to a party's unilateral attempt to alter materially the terms of an otherwise valid agreement is an "agreement" within the terms of Article 29. *Cf.* C.I.S.G., art. 8(3) ("In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."). Here, no circumstances exist to conclude that Chateau des Charmes's conduct evidenced an "agreement." We reject the contention that because Sabate France sent multiple invoices it created an agreement as to the proper forum with Chateau des Charmes. The parties agreed in two telephone calls to a purchase of corks to be shipped in eleven batches. In such circumstances, a party's multiple attempts to alter an agreement unilaterally do not so effect. *See In re CFLC, Inc.*, 166 F.3d 1012, 1019 (9th Cir. 1999).

CONCLUSION

Because the contract for the sale of corks did not contain the forum selection clauses in Sabate France's invoices, there was nothing for the district court to enforce, and its dismissal of this action was an abuse of discretion. The action is reinstated.

REVERSED and REMANDED.

CHATEAU DES CHARMES WINES LTD.,
Plaintiff,
v.
SABATE USA, INC., AND SABATE S.A.,
Defendants.

CASE NUMBER: C-01-4203 MMC

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2002 U.S. Dist. LEXIS 4406

March 12, 2002, Decided
March 12, 2002, Filed; March 14, 2002, Entered in Civil Docket

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

(Docket No. 9)

Before the Court is defendants Sabate USA, Inc. ("Sabate USA") and Sabate S.A.'s ("Sabate France") motion to dismiss, filed December 11, 2001, pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 1404 and 1406. Having considered the papers filed in support of and in opposition to the motion, the Court finds the matter appropriate for decision on the papers, VACATES the hearing scheduled for February 22, 2002, and rules as follows.

BACKGROUND

The instant action arises from the sale of cork-based closures used in bottling wine. Plaintiff Chateau des Charmes Wines Ltd., a Canadian wine maker, allegedly purchased cork-based closures from defendants, in eleven separate

shipments, based on defendants' representations that such closures were of high quality and would not "taint" the wine with undesirable aromas and flavors. (*See* Compl. ¶¶ 11, 22, and 24.) Plaintiff alleges that, contrary to defendants' representations, defendants' closures damaged the smell, character and drinkability of plaintiff's wines. (*See id.* ¶ 28.)

Plaintiff alleges six causes of action: (1) Breach of Express Warranty, (2) Breach of Implied Warranties, (3) Breach of Contract, (4) Misrepresentation, (5) Strict Liability/Negligence, and (6) Violation of False Advertising and Practices Statutes, Cal. Bus. & Prof. Code § 17200, et. seq., and § 17500, et. seq.

LEGAL STANDARD

Rule 12(b)(3) provides that a complaint may be dismissed for "improper venue." *See* Fed. R. Civ. Proc. 12(b)(3). When deciding a motion to dismiss under Rule 12(b)(3), unlike a motion to dismiss under Rule 12(b)(6), the Court need not accept the pleadings as true and may consider facts outside the pleadings. *See R.A. Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996). The facts, however, "must be viewed in the light most favorable to plaintiff" and "disputed fact[s] may be resolved in a manner adverse to the plaintiff only after an evidentiary hearing." *See New Moon Shipping Co. v. Man B & W Diesel AG*, 121 F.3d 24, 29 (1997). Where the material facts are undisputed, the Court need not hold a hearing. *See id.*; *K.K.D. Imports, Inc. v. Karl Heinz Dietrich GmbH & Co.*, 36 F. Supp. 2d 200, 203 (1999).

28 U.S.C. § 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." *See* 28 U.S.C. § 1404(a). 28 U.S.C. § 1406(a) provides: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could

have been brought." *See* 28 U.S.C. § 1406(a). Where the proper venue is located in a foreign country, federal courts lack authority to transfer the action and therefore must dismiss it for improper venue. *See Allen v. Lloyd's of London*, 94 F.3d 923, 932 (4th Cir. 1999) (requiring dismissal where parties selected United Kingdom pursuant to forum selection clause).

DISCUSSION

Defendants assert that plaintiff's complaint should be dismissed based on the forum selection clause contained in the invoices sent to plaintiff in connection with each shipment.[1] The invoices in question contain two similar forum selection clauses, both written in French.[2] On the

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[1] Plaintiff asserts that although the first invoice was received concurrently with the first shipment of corks, subsequent invoices arrived either before or after the shipment. (See Decl. of Pierre-Jean Bosc ¶¶ 18, 19; Lucenti Decl. ¶ 3; Opp'n at 3.) Differences with respect to when the invoices arrived, however, are not material to the instant dispute. *See K.K.D. Imports*, 36 F. Supp. 2d at 202 (holding party bound by forum selection clause received after shipment where party received identical invoices with prior shipments). Nor is it material that after a dispute arose between the parties, defendant Sabate USA sent plaintiff second copies of three invoices, which copies did not included the terms at issue, as it is undisputed that the invoices received by plaintiff in the normal course of business contained those terms. (*See* Lucenti Decl. Exh. A.)

[2] In their initial moving papers, defendants mistakenly relied upon a more recent invoice form rather than the form sent to plaintiff. Although the forum selection language contained on the front of the invoice remains unchanged, language on the back of the invoice was modified. As noted, the invoices sent to plaintiff contain a forum selection clause that applies to "any claims relating to the performance or the interpretation of this agreement." (See Chaurand Decl. Exh. ¶¶ 15). The more recent invoice states that the forum selection clause applies to "any disputes arising out of this

front of each invoice, a forum selection clause, translated into English, states: "Any dispute arising under the present contract is under the sole jurisdiction of the Court of Commerce of the City of Perpignan. (*See* Rosen Decl. Exh. 2.) The back of each invoice contains a similar clause which, translated into English, states: "For any claims relating to the performance or the interpretation of this agreement, the Commercial Tribunal of Perpignan will have sole jurisdiction."[3] (*See* Chaurand Decl. Exh. B.)

Forum selection clauses are presumptively valid and will be enforced unless the party opposing the clause can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *See The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). The "concern of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" strongly favor enforcement of forum selection clauses in international contracts. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985); *see also In Re Oil Spill by Amoco Cadiz*, 659 F.2d 789, 795 (7th Cir. 1981) (holding "special deference [is] owed to forum-selection clauses in international contracts"). The enforceability and interpretation of forum selection clauses are governed by federal law. *See Manetti-Farrow v. Gucci America*, 858 F.2d 509, 513 (9th Cir. 1988).

Plaintiff asserts that its claims should not be dismissed because (1) the forum selection clause is invalid; (2) the forum selection clause, if valid, should not be enforced under the facts presented in this case; and (3) plaintiff's claims

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agreement." (*See* Voss Decl. Ex. 1.) These differences are not material to a determination of the issues presented.

[3] The two clauses will be collectively referred to as the "forum selection clause" where their differences are not significant to the Court's analysis.

against Sabate USA and plaintiff's statutory and tort claims against Sabate France are not subject to the forum selection clause.

A. Enforceability of the Forum Selection Clause

1. Contract Formation

Plaintiff pleads in its complaint that plaintiff and defendants entered into "one or more oral agreements, supported by written invoices, pursuant to which plaintiff agreed to purchase and defendants agreed to sell" the cork closures in question. (*See* Compl. ¶ 52.) Plaintiff now argues that the forum selection clause contained in those invoices is invalid, as the parties never discussed, negotiated or explicitly agreed to a forum-selection clause. (*See* Opp'n at 5; Pierre-Jean Bosc Decl. ¶ 16.) Plaintiff's argument is unavailing. It is well established that a non-negotiated forum selection clause included in a form contract may be enforced even if it was not the subject of bargaining.[4] *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-595 (1991) (enforcing forum selection clause contained on ticket where parties did not negotiate or discuss the clause).

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[4] Plaintiff asserts that the law of Ontario, Canada, rather than Federal law, should govern the question of whether the forum selection clause is part of the parties' agreement "in the first place." (*See* Opp'n at 6.) As noted, however, the enforceability of forum selection clauses is governed by federal law. *See Manetti-Farrow*, 858 F.2d at 513. In that regard, federal courts have not distinguished among the various issues relevant to enforceability. *See id.* (holding interpretation of forum selection clause governed by federal law); *New Moon Shipping*, 121 F.3d 24, 29-32 (applying federal law to determine whether forum selection clause contained in invoices "is a valid part of the contracts"); *K.K.D. Imports*, 36 F. Supp. 2d at 202 (same); *Batchelder v. Kawamoto*, 147 F.3d 915, 919 (9th Cir. 1998) (applying federal law to determine whether plaintiff bound by choice of law clause where plaintiff claimed he never received or consented to clause incorporated by reference in agreement; analogizing choice of law to forum selection).

Moreover, "evidence of a prior course of dealing may establish a party's awareness of and consent to intended contractual terms." *See New Moon Shipping Co. v. Man B & W Diesel AG*, 121 F.3d 24, 31 (2nd Cir. 1997). Here, evidence of plaintiff's prior course of dealing with defendants establishes plaintiff's consent to the forum selection clause. It is undisputed that plaintiff received numerous invoices containing contract terms, including the forum selection clause, and that plaintiff never objected to such terms until the instant dispute arose. (*See* Paul Bosc Decl. ¶ 12.) This tacit acceptance of the terms contained in the invoices demonstrates plaintiff's assent to such terms. *See Pervel Industries, Inc. v. T M Wallcovering, Inc.*, 871 F.2d 7 (2nd Cir. 1989) (holding buyer bound by arbitration clause contained on reverse side of printed order confirmation form where manufacturer had well-established custom of sending such confirmations and buyer retained them without objection).

The fact that the forum selection clause was written in French does not alter the Court's analysis. A party has a duty to read contractual terms even if such terms are written in a foreign language. *See Karlberg European Tanspa, Inc. v. JK-Josef Kratz Vertriebsgesellschaft*, 618 F. Supp. 344, 347 (N.D. Ill 1985) (holding plaintiff bound by forum selection clause written in German where plaintiff did not understand German and parties did not discuss the forum selection clause); *Gaskin v. Stumm Handel GmbH*, 390 F. Supp. 361, 366-367 (S.D. N.Y. 1975) (holding plaintiff bound by contract written in German where plaintiff could not read or understand German).

Accordingly, the Court concludes that plaintiff is bound by the forum selection clause contained in the invoices.

2. Reasonableness of Enforcement

As noted above, forum selection clauses are presumed valid, and will be enforced unless such enforcement would be "unreasonable and unjust, or the clause [is found to be]

invalid for such reasons as fraud or overreaching." *See Bremen*, 407 U.S. at 15.

Here, plaintiff asserts that enforcement of the forum selection clause would be "unreasonable and unjust" for a number of reasons. First, plaintiff argues that it would be unreasonable to enforce the forum selection clause, as only one of the three parties to the instant litigation resides in France. This argument is not persuasive. As noted in the reply, each of the parties resides in a different country and, thus, the perceived inequity would exist regardless of whether the forum selection clause were enforced.

Plaintiff also argues that the agreement in question was negotiated, formed, and performed in Ontario and that Ontario law will "likely" govern plaintiff's breach of contract claims. (*See* Opp'n at 13.) Assuming plaintiff is correct in that regard, plaintiff cites no authority for the proposition that these considerations would render a forum selection clause unenforceable.

Nor has plaintiff demonstrated that enforcement would be unreasonable merely because plaintiff conducts its business in English and the parties negotiated the terms of their agreement in English. As discussed above, forum selection clauses are enforceable even where the clause requires the dispute to be litigated in a forum where one party does not speak the language. *See Karlberg European Tanspa, Inc.*, 618 F. Supp. at 347 (holding plaintiff bound by forum selection clause written in German; requiring plaintiff to litigate in Germany where plaintiff did not understand German and parties negotiated terms in English).

Finally, plaintiff asserts that enforcement of the forum selection clause would impose enormous hardship and inconvenience on plaintiff and its employees. To avoid enforcement of a forum selection clause on the grounds of inconvenience, plaintiff must demonstrate that "trial in the contractual forum will be so gravely difficult and inconvenient that [plaintiff] will for all practical purposes be

deprived of his day in court." *See Bremen*, 407 U.S. at 18. Plaintiff has failed to make such a showing, as plaintiff states only that its business would be "adversely affected" if its employees were forced to travel to France to litigate this dispute.[5] (*See* Opp'n at 14.)

Accordingly, the Court finds that enforcement of the forum selection clause would not be unreasonable or unjust.

B. Scope of the Forum Selection Clause

Plaintiff contends that many of its claims are not subject to dismissal even if the Court enforces the forum selection clause. Specifically, plaintiff asserts that the forum selection clause does not apply to plaintiff's claims against Sabate USA or to plaintiff's tort and statutory claims against Sabate France.

1. Sabate USA

Plaintiff asserts that the forum selection clause is inapplicable to Sabate USA because Sabate USA was not a party to the agreement containing the clause and there is no evidence that either party intended it to be a third party beneficiary. Plaintiff's argument is not persuasive. A valid forum selection clause may both bind and be enforceable by the contracting parties as well as others whose conduct is "so closely related to the contractual relationship" that they "should benefit from and be subject to" the clause. *See Manetti Farrow v. Gucci America*, 858 F.2d at 514 n.5 (upholding dismissal under forum selection clause of claims against non-signatory subsidiary alleged to have fraudulently obtained plaintiff's customer lists in connection with termination of exclusive dealership agreement entered between plaintiff and another subsidiary). Here, Sabate USA is a wholly-owned subsidiary of Sabate France, formed to

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[5] The Court notes that plaintiff's employees will be forced to travel regardless of whether the Court enforces the forum selection clause, as plaintiff chose to litigate the dispute in California rather than in Ontario, where the winery is located.

pursue sales and marketing opportunities on behalf of its parent corporation. (*See* Sabate Decl. ¶ 3.) In the instant action, plaintiff asserts that Sabate USA was "directly involved in the transaction at issue here," as Sabate USA acted as the local contact for the sale of defendants' products in North America and investigated plaintiff's complaint with respect to the performance of defendants' cork closures once a problem was detected. (*See* Decl. of Paul Bosc ¶¶ 6, 9.) Under such circumstances, Sabate USA's conduct was "closely related to the contractual relationship" at issue and the forum selection clause contained therein is applicable to plaintiff's claims against Sabate USA. *See Manetti Farrow*, 858 F.2d at 514 n.5; *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 202-204 (3rd Cir. 1983) (holding non-signatory defendant bound by forum selection clause as third party beneficiary where such defendant's involvement in dispute was foreseeable), *overruled on other grounds by Lauro Lines v. Chasser*, 490 U.S. 495 (1989).

2. Statutory and Tort Claims

Plaintiff asserts that the forum selection clause is inapplicable to the statutory and tort claims asserted against Sabate France because such claims do not "arise under" the parties' contract.[6] Plaintiff states no authority in support of this proposition.

"Where the relationship between the parties is contractual, the pleading of alternative non-contractual theories of liability" does not prevent enforcement of a forum selection clause. *See Coastal Steel*, 709 F.2d at 203 (holding "claims such as negligent design, breach of implied warranty, or misrepresentation" subject to dismissal based on forum selection clause). For example, a forum selection clause "can

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[6] As noted, the forum selection clauses at issue state that the Commerical Tribunal of Perpignan will have sole jurisdiction to resolve "any dispute arising under the present contract" and "for any claims relating to the performance or the interpretation of this agreement." (*See* Rosen Decl. Ex. 2; Chaurand Decl. Exh. B ¶ 15.)

be equally applicable to contractual and tort causes of action." *See Manetti Farrow*, 858 F.2d at 514. Whether a forum selection clause applies to non-contractual claims depends on whether resolution of the claims "relates to interpretation of the contract." *See id.* (holding unfair trade practices and other non-contractual claims properly dismissed based on forum selection clause); *Lambert v. Kysar*, 983 F.2d 1110, 1121-22 (1st Cir. 1993) (holding tort claims subject to dismissal based on forum selection clause where tort claims "involve the same operative facts as a parallel claim for breach of contract.")[7]

Here, plaintiff's breach of contract claim is based on defendants' alleged agreement to sell cork closures that were "free of any defects" and that would "eliminate cork taint." (*See* Compl. ¶ 53.) Plaintiff's tort and statutory claims relate to defendant's performance under that contract and involve the same operative facts. Specifically, plaintiff alleges that defendants breached express and implied warranties by selling corks that caused cork taint; that defendants misrepresented the quality of the corks to induce plaintiff to purchase them; that defendant placed defective products, i.e. products that cause "cork taint," in the stream of commerce; and that defendants made false and misleading statements about their corks in advertising materials. (*See* Compl. ¶¶ 37-76.) Such claims are governed by the forum selection clause, as their resolution "relates to interpretation of the contract," *see Manetti Farrow*, 858 F.2d at 514, and the claims "involve the same operative facts as a parallel claim for breach of contract," *see Lambert v. Kysar*, 983 F.2d at 1121-22.

Accordingly, the forum selection clause is applicable to plaintiff's tort and statutory claims.[8]

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[7] The Court sees no reason to distinguish between tort and statutory claims in this regard.

[8] In light of the Court's ruling that all of the claims alleged in the Complaint are subject to the forum selection clause, and thus subject to dismissal under Rule 12(b)(3), the Court will not address defendants' alternative motion to dismiss under §§ 1404 and 1406.

C. Additional Discovery

Plaintiff argues that, if the Court does not deny defendant's motion, plaintiff should be allowed to conduct additional discovery with respect to a variety of "critical matters." (*See* Opp'n at 19.) Plaintiff, however, has failed to demonstrate how such matters relate to the issue of whether plaintiff's complaint should be dismissed based on the forum selection clause.

Accordingly, the Court denies plaintiff's request to conduct additional discovery.

CONCLUSION

For the reasons stated, defendants' motion to dismiss pursuant to Rule 12(b)(3) is hereby GRANTED and plaintiff's complaint is hereby DISMISSED.

This order closes Docket No. 9.

IT IS SO ORDERED.

Dated: MAR 12 2002

MAXINE M. CHESNEY

United States District Judge

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED defendants' motion to dismiss pursuant to Rule 12(b)(3) is hereby GRANTED and plaintiff's complaint is hereby DISMISSED.

MAR 12 2002
Date

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHATEAU DES CHARMES WINES LTD.,
Plaintiff - Appellant,
v.
SABATE USA, INC., SABATE S.A.,
Defendants - Appellees.

No. 02-15727

D.C. No. CV-01-04203-MMC
Northern District of California,
San Francisco

ORDER

Before: B. FLETCHER, KOZINSKI, and TROTT, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Kozinski and Trott vote to deny the petition for rehearing en banc and Judge B. Fletcher so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

FILED June 26, 2003
Cathy A. Catterson, Clerk
U.S. Court of Appeals

United Nations Convention on Contracts for the International Sale of Goods

Article 4

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

(a) the validity of the contract or of any of its provisions or of any usage;

(b) the effect which the contract may have on the property in the goods sold.

Article 8

(1) For the purpose of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Article 9

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Article 18

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches of offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

Article 19

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counteroffer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which

do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Article 29

(1) A contract may be modified or terminated by mere agreement of the parties.

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

Supreme Court, U.S.
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No. 03-465

IN THE

Supreme Court of the United States

October Term, 2003

SABATE S.A. and SABATE U.S.A., INC.,
Petitioners,

vs.

CHATEAU DES CHARMES WINES LTD.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

The respondent Chateau des Charmes Wines Ltd. is a privately held corporation organized under the laws of the Province of Ontario, Canada. The respondent has no parent corporation, and no publicly traded company owns 10% or more of the respondent's stock.

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COUNTER-STATEMENT OF THE CASE

The respondent Chateau des Charmes Wines Ltd. respectfully requests the Court to deny the petition for writ of certiorari, seeking review of the Ninth Circuit's non-final decision in this case. That opinion is reported at 328 F.3d 528 (2003).

The Ninth Circuit's per curiam opinion does not conflict with other circuit court decisions, nor does it involve an issue of compelling significance. Rather, the decision correctly applied the United Nations Convention on Contracts for the International Sale of Goods ("CISG") to an unusual set of circumstances, reaching a result consistent with that treaty, with other decisions, and with common sense. Moreover, the Ninth Circuit decided the appeal on grounds not even discussed by the district court, and not briefed by the parties until after oral argument in the Court of Appeals.[1] Finally, the Ninth Circuit's non-final decision was correct.

Shorn of rhetoric, this case involves petitioners' effort to unilaterally impose an inconvenient forum on respondent by including – after their contract was made – a paragraph on its billing invoices, in French, directing that all disputes be resolved by a French court. The Ninth Circuit correctly held that this international sale of goods was governed by the CISG, and that the parties had reached an oral agreement on all material terms prior to any shipments. The court considered the totality of circumstances, including the lack of any prior dealings between the parties, and correctly concluded that the later billing invoices, which contained additional terms

---

[1] Oral argument was held on March 31, 2003. Respondent submitted a 2-page letter brief discussing the CISG, pursuant to Ninth Circuit Rule 28-6 and Federal Rule of Appellate Procedure 28(j), on April 8, 2003. Petitioners, following an Order by the Ninth Circuit on April 17, 2003, submitted a 2-page response on April 24, 2003.

beyond those the parties had bargained,[2] did not modify that agreement. The court reasoned that "[a]dditional or different terms relating, among other things, to . . . the settlement of disputes are considered to alter the terms of the offer materially" (Pet. 5a) (citing CISG Art. 19(3)), and held that petitioners' failure to obtain respondent's assent prevented the forum selection clause from becoming part of their agreement. Thus, the court simply applied the law of the treaty to these particular facts. There is nothing to suggest the issues of the treaty's application, or the court's interpretation, are of great importance. The lack of case law on the issues proves that these issues are not significant, and petitioners' attempt to create the illusion of a conflict in authority cannot withstand scrutiny. The petition should be denied.

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[2] The billing invoice reflected accurately, in English, those terms that had been discussed and agreed upon (i.e., price, product, and quantity), but then sought unilaterally to add additional French language terms, including the disputed forum selection clause.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Question Presented in the Petition Was Not Decided by the Ninth Circuit.

The petition's sole question does not accurately reflect the issue decided by the Ninth Circuit, or presented by the record. That question as framed by the petitioners asks whether the CISG "invalidates terms set forth in a commercial invoice or letter of confirmation without regard to the practices of the parties or trade usages." However interesting that question may be, it is not the question decided by the Ninth Circuit. The court determined that the parties had reached an oral agreement that did not include any forum selection provisions, that the parties' oral agreement was complete and binding, and that the parties did not, either expressly or through subsequent dealings, modify that agreement to include a forum selection clause. (Pet. 5a-6a). The appeals court did consider the conduct of the parties, finding no prior course of dealing between the parties, and concluded that the respondent did not conduct itself "in a manner that evidenced any affirmative assent to the forum selection clause in the invoice" (Pet. 6a). The Ninth Circuit cited article 8(3) of the CISG, and found that "no circumstances exist" to indicate that respondent had made any agreement to accept the additional terms in the billing invoices. The court thus did not "invalidate" the terms of any agreement, but instead determined that the disputed clause was not part of the parties' agreement. The question "presented" was thus not decided, or even discussed, by either the Ninth Circuit or the district court.[3]

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[3] Supreme Court Rule 14.4 states that "[t]he failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the court to deny a petition."

In an effort to manufacture some conflict in authority and a question of significance, petitioners' arguments distort the record, and the Ninth Circuit's decision. This is not a case where an *order* for goods was met with a written invoice, which the purchaser acknowledged or otherwise affirmatively adopted. Nor is it a case where the parties had any *prior* course of dealing, or where trade usages were relevant to the contract. Here, as correctly found by the Ninth Circuit, the parties reached a completed oral agreement on all necessary material terms: price, amount, and payment and shipping terms.[4] "No other terms were discussed, nor did the parties have any history of prior dealings." (Pet. 2a). The billing invoices that were sent in connection with each shipment did not purport to change any agreed upon contract term. What those invoices attempted, but failed to do under CISG, was to engraft a new "material term," written in French, that specified that "any dispute arising under the present contract is under the sole jurisdiction of the Court of Commerce of the City of Perpignan." (Pet. 2a). Respondent never acknowledged this provision, never communicated with petitioners about the forum clause, and never took any action that could reasonably considered to be an affirmative assent to the clause. The court also logically and correctly held that respondent's "failure to object" to petitioners' unilateral attempt to modify the contract was not an "agreement" to the modification under CISG. The Ninth Circuit thus did consider the practices of the parties and trade usages and simply resolved the issue of assent on the specific facts and record before it.

---

[4] Contrary to arguments appearing at page 14 of the Petition, to the extent that the billing invoice correctly reiterated and confirmed the parties' discussions as to the price, quantity and product, it "supported" the oral agreement as pleaded by respondent. However, this allegation does not imply or otherwise prove petitioners' argument that the billing invoice was or became the contract, or that the material additional terms could be unilaterally engrafted into the agreement by petitioners' billing invoice.

2. There Is No Conflict among the Courts of Appeals.

A. *There Is No Disagreement on Applying the CISG.*

The petitioners seek to engineer several different conflicts. At first they assert that the Ninth Circuit erred in holding that the CISG governed the question of contract formation. This claim is difficult to square with the plain language of the treaty, which provides, in Article 4, that it "governs only the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such a contract." (Pet. 21a). The Ninth Circuit expressly addressed decisions by the First and Second Circuits that reached a different result,[5] distinguishing those decisions on their facts. (Pet. 4a). Petitioners do not cite these decisions; instead, the only "conflicting" authorities cited by petitioners are law review articles, and decisions from courts in Argentina and the Netherlands. As such, there are in fact no directly conflicting opinions.

Moreover, the asserted conflicts, even if accurate, are not of significance to this Court. "A genuine conflict, as opposed to a mere conflict in principle, arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts." ROBERT L. STERN ET AL, SUPREME COURT PRACTICE, § 4.3, p. 226 (8th ed. 2002). Rule 10 recites the circumstances the Court will consider in granting a petition, and identifies conflicts between the Court of Appeals, conflicts with a decision of a state court of last resort, or situations so far "departed from the accepted and usual course of judicial

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[5] *See, Evolution Online Sys. Inc. v. Koninklijke Nederland N.V., KPN,* 145 F.3d 505, 509 (2d Cir. 1998); *Lambert v. Kysar,* 983 F.2d 1110, 1119 (1st Cir. 1993).

proceedings" that the Court should exercise its supervisory powers. Purported conflicts with foreign tribunals, or disagreements with the views of commentators, do not warrant this Court's intervention.[6]

Further, the asserted "conflict" between these foreign authorities and the Ninth Circuit's decision simply does not exist. Petitioners ignore the Ninth Circuit's clear holding that the oral agreement between the parties was completed without any discussion of dispute resolution. Contrary to petitioners' claim, the issue is not one of *interpreting or enforcing* the forum clause; as the Ninth Circuit correctly found, the billing invoice language was never a part of the parties' agreement. As such, there was no need for the court to interpret the clause, let alone determine its enforceability under existing precedent. Had the parties negotiated a forum selection as part of their completed oral agreement, doubtless the Ninth Circuit would have enforced it.

As such, it is difficult to understand petitioners' argument that this decision is in conflict with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), or the Seventh Circuit's decision in *In re Oil Spill by Amoco Cadiz*, 659 F.2d 789 (7th Cir. 1981). The fact that an arbitration clause that is clearly part of a contract should be enforced is irrelevant to the question of whether this forum selection clause was a part of the parties' agreement. The basic holding below that the CISG does not permit a party to unilaterally add additional material terms to an oral agreement without obtaining assent in no way conflicts with these cases. There is simply no conflict.

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[6] Moreover, the Eleventh Circuit decision which petitioners claim conflicts with the Ninth Circuit's substantive ruling, *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.P.A.*, 144 F.3d 1384, 1387 (11th Cir. 1998), *cert. denied*, 526 U.S. 1087 (1999), applied the CISG to a similar question of contract formation, concerning the admissibility of parole evidence. Thus, there is no conflict among the courts of appeals on this first issue.

B. *There is No Conflict on Issues of Contract Formation or Modification.*

The petitioners' next claimed conflict concerns the substance of the CISG, arguing that the Ninth Circuit's conclusion that the parties' oral agreement was not modified by later billing invoices is inconsistent with other decisions. Once again, the petitioners identify commentators and foreign tribunals as the primary sources of conflict. But whether a Swiss, Dutch, or Austrian court would reach a different result on these specific and unusual facts[7] are not questions that trigger this Court's review.[8] Similarly, the general views of commentators, no matter how well credentialed or influential, do not demonstrate a significant conflict warranting this Court's intervention. Moreover, petitioners did not argue this position below, instead relying on the assertion that the applicability of the forum selection clause was an issue of federal procedural law, without addressing how the issue would be decided under CISG.[9]

---

[7] The case is "unusual" in that the parties consummated this contract in an oral agreement and had no prior history of dealings. Moreover, how and when the billing invoices were sent, and the terms reflected in each, are obviously case specific matters.

[8] While petitioners argue that the foreign decisions cited conflict with the question articulated in the petition, they do not conflict with what the Ninth Circuit in fact decided. For example, the Swiss court's determination that the terms of a seller's written confirmation, in response to a buyer's order, constituted a contract is not at odds with the decision here. *See W.T. GmbH v. P. AG.*, No. P4 1991/238 (2G Basel, Switz. Dec. 21, 1992). The German case cited, which held that the buyer had lost its right to reject the goods provided because it failed to examine the goods as required by the CISG, does not even deal with the same issues, and is in fact consistent with the Ninth Circuit's finding that there was no 'trade usage" in this case. *See* No. 1 U69/92 (Oberlandesgericht Saarbrücken (Ger.) Jan. 13, 1993). The remaining cases discussing trade usage are similarly far afield.

[9] *See* Petitioners letter to the Ninth Circuit of April 24, 2003.

Finally, petitioners' claim that a conflict exists is wrong. It relies on a mischaracterization of the facts, and of the Ninth Circuit's holding. Here the court did consider all of the relevant facts and circumstances in determining the material terms that made up the agreement. Contrary to petitioners' persistent and factually unsupported assertion, there was no prior course of dealing between the parties before the oral agreement was finalized.[10] Similarly, there was no "invalidation" of agreed upon terms by the Ninth Circuit. The invoices sent by petitioners did not alter any of the material terms already agreed upon, but instead attempted to add a new material term, written in a foreign language, to a completed agreement. The court properly concluded, after considering all of the circumstances, that respondent never agreed to the forum clause. The court did not improperly interpret, invalidate or refuse to enforce an otherwise valid forum selection clause. It may be that under a different set of facts and circumstances the terms of an invoice may be incorporated into the parties' agreement pursuant to the CISG. It may be that some commentators, or some foreign court, might weigh the facts and circumstances differently and reach a different result. But those possibilities are decidedly not a conflict sufficient to justify a grant of certiorari in this case.

Petitioners do try to create a conflict between the decision here and the Eleventh Circuit's decision in *MCC-Marble*, *supra*, n.6. Not surprisingly, the petition never explains what the claimed conflict is, stating only that the holding in that case is irreconcilable with this one. (Pet. 12). Petitioners are wrong. First, *MCC-Marble* concerned an issue of contract interpretation, not contract formation. Second, both the buyer and seller

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[10] "No other terms were discussed, nor did the parties have any history of prior dealings." (Pet. 2a)

had *signed* the written order which contained the disputed clause sought to be avoided by the buyer. In denying the seller's summary judgment motion, the Eleventh Circuit refused to apply the parole evidence rule to a question of contract interpretation, because the CISG requires a court to consider questions of the parties' intent. *MCC-Marble*, 144 F.3d at 1388. Significantly, the court noted that it was necessary to give "due consideration . . . to all relevant circumstances" in assessing the parties' intent. *Id.* at 1389. Even a cursory reading of the decision here shows that the Ninth Circuit and the Eleventh Circuit decisions are not in conflict and, indeed, involve different legal issues. Moreover, even ignoring that the legal issues are dissimilar, it is also clear that both courts conducted the same basic analysis, and reached consistent results. The Ninth Circuit did consider all of the relevant circumstances, and concluded that the parties' agreement had not been modified by the billing invoice term. There is simply no conflict with the Eleventh Circuit.

3. The Question Does Not Present an Issue of Great Significance.

Even if there were a conflict, the issue must be one of great importance to warrant review. Petitioners have come nowhere close to presenting "compelling reasons" for review of the Ninth Circuit's decision. Initially, as noted, the decision is highly fact specific. The Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). While the CISG doubtless has a role to play in international commerce, it is not this Court's role to provide a general commentary on the Treaty, or to issue advisory opinions on how it can best be implemented. As noted by the Eleventh Circuit, "[d]espite the CISG's

broad scope, surprisingly few cases have applied the convention in the United States." *MCC-Marble*, 144 F.3d at 1389. *See also Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1027-28 (2d Cir. 1995) ("There is virtually no case law under the convention").[11] It is for the courts of appeals to develop a body of law interpreting the CISG. This is not a sufficiently "important" federal matter warranting this Court's review.

4. The Ninth Circuit's Decision Is Not Final.

While the Court has jurisdiction to review interlocutory judgments, that jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Here, as in nearly all appeals from non-final judgments, the posture of the case is itself enough to warrant denial of the petition. *See, e.g., Brotherhood of Locomotive Firemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967); *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring); R. STERN, *supra*, § 4.18, at p. 258. The case may resolve itself through settlement, or on some other basis. The lack of finality counsels strongly in favor of denying the petition.

5. The Controlling Question Was Not Even Mentioned by the District Court.

A final ground for denying the petition is that the district court did not even mention the CISG, let alone base its decision to enforce the forum clause on that treaty. (Pet. 7a-17a). In contrast, here the petition's singular focus is on the CISG. The district court, after canceling oral argument and deciding the petitioners'

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[11] Further, the per curiam decision did not garner a single vote for rehearing *en banc*. (19a).

motion to dismiss on the papers, erroneously relied on the argument, first raised in their reply brief, that the parties "prior course of dealing" proved that the plaintiff consented to the French language forum clause on the billing invoices. (Pet. 12a). The district court's decision was wrong on the law, and misconstrued the material facts. Not surprisingly, the parties' briefing in the Ninth Circuit focused on the state and federal law issues discussed by the district court, and did not mention the CISG. It was only following oral argument, after the Ninth Circuit panel raised the issue, that the parties presented that court with 2 page letter briefs on the CISG.[12]

The Ninth Circuit's analysis was well-reasoned and correct. But this Court is better served when both the district court and the court of appeals have addressed the question presented by the petition, and have done so on the basis of full briefing. A petition for certiorari should not be the first time the parties fully express their positions on the question. Only in the rarest instances should this Court review a decision without the benefit of both a district court and a court of appeals opinion on the question presented. This is not one of those rare instances. The lack of a fully developed record is yet another reason why the petition should be denied.

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[12] See n.1, *supra*.

CONCLUSION

The Ninth Circuit, in finding that the parties completed oral agreement was enforceable without modification under the CISG, did not consider or decide whether the CISG "invalidates terms set forth in a commercial invoice . . . without regard to the practices of the parties or trade usages." Thus, the question presented in the petition was never decided below. Moreover, even were the question squarely presented, there is no conflict among the federal courts on the issue, and no question of sufficient importance. Moreover, the decision is not final. The petition should be denied.

Dated: Buffalo, New York
October 29, 2003

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IN THE

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On Petition for a Writ of Certiorari
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REPLY BRIEF FOR THE PETITIONERS

This case presents a fundamental and frequently recurring question under the most important treaty governing international trade, the U.N. Convention on Contracts for the International Sale of Goods (CISG). As the petition demonstrated and respondent does not seriously dispute, it is a question on which, as a result of the decision below, the United States has set itself at odds with the uniform view of other CISG signatories, inevitably disrupting international commerce. Relatedly, the Ninth Circuit's decision creates a square circuit conflict within the U.S. on the basic rules for interpreting contracts under the CISG. Furthermore, the result in the case – that a sophisticated business is not bound by a standard forum-selection clause set forth on the front and back of numerous invoices that it received and paid – is absurd and runs contrary to basic contracting rules the world over. In this case and No. 02-1318, *Zapata Hermanos Sucesores, S.A.* v. *Hearthside Baking Co.* (also set for the November 26, 2003 conference), the Court accordingly has the opportunity to address finally a critical international treaty that has been the subject of extensive jurisprudence in other nations.

Certiorari accordingly should be granted.

1. The petition demonstrated that the Ninth Circuit's holding places the United States in direct conflict with other CISG signatory states on a question that is fundamental to the Convention's effectiveness. Foreign tribunals *uniformly* conclude that material terms in a letter of confirmation or invoice are effective upon payment by the purchaser, at least so long as they are not inconsistent with trade practice. See Pet. 10-11. Because respondent cannot seriously dispute the conflict created by the decision below, it instead contends that "conflicts with foreign tribunals * * * do not warrant this Court's intervention." BIO 6.

Respondent's conception of this Court's role on certiorari is misguided, for there is an inescapable analogy

between the circumstances presented by this case and a circuit split. The conflict highlights the fact that the question presented is difficult and therefore merits this Court's intervention, while also giving rise to serious adverse practical consequences. As a result of the decision below, companies engaged in international trade (and in particular those domiciled in the United States) face the untenable circumstance that their contracts will potentially be subject to review before different national tribunals that apply the Convention's terms in irreconcilable ways. The status quo not only is an open invitation to forum shopping (as here, in which a dispute between French and Canadian companies is being litigated in California), but also casts serious doubt on the viability of a common contracting practice – namely, the use of standard forum-selection and arbitration provisions in written confirmations.

If there were ever a circumstance in which this Court would grant certiorari based on the jurisprudence of foreign tribunals, this is it. Petitioners rely on foreign decisions not by *analogy*, but as *embodying the conflict*. The precise purpose of the CISG is to establish "uniform rules which govern contracts for the international sale of goods" (CISG pmbl.), and the United States subscribed to the Convention to eliminate "legal uncertainty" regarding the rules governing international sales contracts (Letter of Secretary of State Shultz Submitting the CISG to President Reagan (Aug. 30, 1983)).[1] For this Court to leave unreviewed an important ruling that contradicts the uniform view of other CISG

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[1] See also CISG art. 7(1) (instructing that "[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application"); *Explanatory Note by the UNCITRAL Secretariat on the U.N. Convention for the Int'l Sale of Goods*, ¶ 13, *available at http://www.cisg.law.pace.edu/cisg/text/p23.html* (visited Nov. 3, 2003) (the CISG "will better fulfill its purpose if it is interpreted in a consistent manner in all legal systems").

signatories that the Ninth Circuit does not even bother to cite would reflect disdain for the holdings of the courts of other sovereigns and would leave international commerce in an unacceptable state of uncertainty.

In any event, respondent ignores that the Ninth Circuit's decision gives rise to a second untenable conflict, this one between the rules governing domestic commerce and those governing international commerce with CISG signatory states. The petition demonstrated, and respondent does not dispute, that U.S. domestic law would enforce the forum-selection clause in this case on either of two grounds: as the court of appeals recognized, the U.C.C. would require the contract in this case to be in writing (Pet. App. 5a n.3); and as the district court recognized, forum-selection clauses are "presumptively valid" in the U.S. unless "clearly * * * unreasonable and unjust" (Pet. App. 10a (quoting *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972))). The same is true of arbitration clauses. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985). But domestic companies that include these basic terms in their invoices and letters of confirmation now must undertake the impossible burden of creating a special contracting procedure for orders received from CISG contracting states.

2. As noted, respondent does not seriously dispute that the Ninth Circuit's decision conflicts with the jurisprudence of foreign tribunals. The facts giving rise to this case are clear and undisputed. As respondent acknowledges, the court of appeals held "that '[a]dditional or different terms relating, among other things, to * * * the settlement of disputes are considered to alter the terms of the offer materially.'" BIO 2 (quoting Pet. App. 5a). Respondent further acknowledges that the Ninth Circuit "*held* that respondent's 'failure to object'" to the forum-selection clause did not amount to "an 'agreement' * * * under [the] CISG."

Id. 4 (emphasis added).[2] The Ninth Circuit thus refused to consider the totality of the circumstances of the parties' relationship or to remand the case for an evaluation of industry trade practice, and it obviously did not "consider[] the totality of [the] circumstances." Contra BIO 1.[3]

The first conflict created by the decision below goes to whether the enforcement of a forum-selection clause is governed by the CISG at all. See Pet. 5-6. Under the

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[2] Respondent's contention that the Ninth Circuit held not that the CISG "invalidates terms set forth in a commercial invoice or letter of confirmation" (Pet. i), but rather that those terms are "not part of the parties' agreement" in the first place (BIO 3), amounts to dancing on the head of a pin. The court of appeals held that the material terms of an invoice are unenforceable, which is the issue presented by the petition.

[3] Respondent's assertion that this is not a case in which "trade usages were relevant to the contract" (BIO 4) is thus inexplicable. The one statement of the Ninth Circuit cited by respondent – its conclusion that respondent did not act "in a manner that evidenced any affirmative assent to the forum selection clause" (Pet. App. 6a, *cited in* BIO 3) – certainly does not purport to approve an inquiry into the totality of the circumstances. Rather, it reflects the fact that, as the opposition explains, after respondent placed the oral order, it "never acknowledged [the forum selection] provision, never communicated with petitioners about the forum clause, and never took any action that could reasonably considered [*sic*] to be an affirmative assent to the clause" (BIO 4) except, that is, that respondent *paid the invoices*. That is precisely what happens in almost all cases in which a purchaser receives an invoice. Respondent's further claim that this is not "a case where the parties had any *prior* course of dealing" (BIO 4 (emphasis in original)) is an overstatement and in any event does not detract from the importance of the case. As the district court properly recognized, by the time respondent placed its second oral order, it had received several invoices containing the forum-selection clause. Further, the great majority of cases in which the question presented arises will be ordinary commercial transactions in which the parties do not have a long-standing contractual relationship.

Convention, "the validity of [a] contract or of any of its provisions or of any usage" is a question of domestic law. CISG art. 4(a). Respondent, like the Ninth Circuit, characterizes this case as presenting a question of contract formation, which is governed by the CISG (Pet. App. 4a (citing CISG art. 1(1)(a))), such that "the issue is not one of interpreting or enforcing the forum [selection] clause" (BIO 6 (emphases omitted)). But respondent's argument is just a restatement of the very holding by the Ninth Circuit that conflicts with the jurisprudence of other CISG signatories. Those tribunals manifestly *do not* accept that the enforceability of a writing containing a forum-selection clause is a question of "formation" governed by the CISG; they regard it as a question of "validity" governed by domestic law. See Pet. 5-6. The conflict is furthermore outcome determinative because (as noted) it is undisputed that U.S. courts would enforce the forum-selection clause in this case.

The second conflict created by the decision below goes to whether, assuming the case is governed by the CISG, material terms of a written invoice or letter of confirmation are valid when they follow an order. The courts of other CISG signatory states – as confirmed by CISG scholars – would deem it dispositive in this case that respondent paid, without objection, invoices in which petitioners had included a prominently displayed forum-selection clause. At a minimum, those courts would have remanded to allow the trial court to determine whether the inclusion of a forum-selection clause was an accepted trade practice. See Pet. 10-12. See also E.A. Farnsworth, *Article 18: Acceptance*, *in* Commentary on the International Sales Law: The 1980 Vienna Sales Convention 163, 166 (C.M. Bianca & M.J. Bonell, eds., 1987) (noting that "the buyer's payment of the price" may constitute acceptance).[4]

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[4] Respondent makes a passing attempt to distinguish only two of the cases cited by the petition. But even these limited arguments

As an entirely separate matter, there is a clear conflict between the Ninth and Eleventh Circuits on the basic rules for applying the CISG. As set forth in the petition, the Eleventh Circuit in *MCC-Marble* resolved a similar legal issue: the binding effect of an oral agreement not included in the signed invoice executed by the parties. In contrast to the Ninth Circuit's narrow focus on selected language from a few CISG provisions, the Eleventh Circuit expressly considered not only the text of the CISG, but also "*all* relevant circumstances of the case" and "the great weight of academic commentary." See *MCC-Marble Ceramic Center, Inc.* v. *Ceramica Nuova d'Agostino, S.P.A.*, 144 F.3d 1384, 1389-90 (CA11 1998) (emphasis added), cert. denied, 526 U.S. 1089 (1999).

3. Certiorari is also warranted because this case has profound importance for commerce. The circumstances presented by this case recur frequently. Respondent placed two oral orders in which it agreed with petitioners on price, quantity, and delivery terms. Petitioners sent eleven invoices. Respondent paid petitioners without objection. The Ninth Circuit held that, in this common circumstance, the oral order

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are unpersuasive. Respondent contends (at 7 n.8) that in *W.T. GmbH* v. *P. AG*, No. P4 1991/238 (ZG Basel, Switz. Dec. 21, 1992), the court determined that "the terms of a seller's written confirmation, in response to a buyer's order, constituted a contract." Precisely. See *id.* ("Had the defendant, after receipt of the confirmation letter * * * wished to have been understood by the [seller] to be in fact not a contractual partner * * *, she would have had to inform the [seller] of this at that moment."). The relevant point is that the Ninth Circuit reached precisely the opposite conclusion.

Respondent's assertion (at 7 n.8) that No. 1 U69/92 (Oberlandesgericht Saarbrücken (Ger.) Jan. 13, 1993)) "is in fact consistent with the Ninth Circuit's finding that there was no 'trade usage' in this case" is inexplicable. The court did not decide whether a trade usage existed in that case. But in any event, the case had nothing at all to do with trade practice in the wine-closure industry.

constitutes the entirety of the parties' agreement such that the further written terms are without any force. Pet. App. 5a-6a.

There is nothing "unusual" about a circumstance in which (a) an order is followed by a written confirmation, and (b) the parties' discussions did not address the issue of dispute resolution. To the contrary, as the petition demonstrated, the practice of placing oral orders for goods is commonplace, and the discussions in which such orders are placed rarely address dispute-resolution terms such as forum-selection and arbitration clauses. Critically, both forum-selection and arbitration clauses *must* be in writing in Europe (see Council Reg. (EC) No. 44/2001 of 22 Dec. 2000), while at least the latter are generally required to be in writing in the United States (see, *e.g.*, Federal Arbitration Act, 9 U.S.C. 2). Moreover, both U.S. and international commercial law hold that forum-selection and arbitration clauses are valid and enforceable, including when they are included in invoices. See Pet. 5-7, 10-11. And no question could be more fundamental than whether the written terms are valid.

Respondent's reliance on the fact that "surprisingly few cases have applied the convention in the United States" (BIO 9-10) is misguided. There is an enormous jurisprudence under the CISG in other signatory states. Comprehensive domestic and international web-sites are devoted to the Convention, decisions interpreting it, and relevant scholarship. See, *e.g.*, Pace University Law School: CISG Database, *available at http://www.cisg.law.pace.edu* (visited Nov. 3, 2003); Centre for Comparative and Foreign Law Studies, UNILEX: CISG Database, *available at http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=14315* (visited Nov. 3, 2003); CISG-Online.ch: Cases, Materials, Legal Texts, *available at http://www.cisg-online.ch* (visited Nov. 4, 2003). The relative paucity of U.S. case law arises from the fact that, as the petition emphasizes, most agreements under the CISG are governed by written forum-selection and arbitration clauses. Contracting parties generally avoid the U.S. because of the grossly

disproportionate costs of litigation in this country and generally choose arbitration over litigation. See Reply Br. for the Pet'r, *Zapata*, *supra*, 6 n.2. A ruling by this Court is essential to ensure that disappointed purchasers such as respondent do not initiate proceedings in the United States invoking the Ninth Circuit's holding that they are not bound by a forum-selection or arbitration provision set forth in an invoice or letter of confirmation. A ruling by this Court will furthermore provide critical, binding guidance in the large number of arbitrations conducted under the CISG in this country.

4. Respondent finally errs in contending that certiorari is inappropriate because the case is "interlocutory." The court of appeals finally decided the federal law questions in this case – *viz.*, the CISG's meaning and also its application to this case. The trial will address whether petitioners' corks ruined respondent's wine, a question that will neither illuminate the question presented nor present another federal law issue for this Court to resolve. Respondent itself articulates the reason why, in this circumstance, the Court's practice is to grant certiorari rather than awaiting a later appeal that may never occur: "The case may resolve itself through settlement, or on some other basis." BIO 10.[5]

Nor is there merit to respondent's suggestion (BIO 10-11) that certiorari is unwarranted because the briefing in the proceedings below is somehow underdeveloped. To be sure, *respondent* did not rely on the CISG in its complaint, nor did

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[5] For recent cases in which certiorari was granted in this posture, see, *e.g.*, *Dastar Corp.* v. *20th Century Fox*, 123 S. Ct. 2041 (2003); *Nevada Dep't of Human Resources* v. *Hibbs*, 123 S. Ct. 1972 (2003); *Franchise Tax Bd.* v. *Hyatt*, 123 S. Ct. 1683 (2003); *City of Cuyahoga Falls* v. *Buckeye Community Hope Foundation*, 123 S. Ct. 1389 (2003); *United States* v. *Navajo Nation*, 537 U.S. 488 (2003); *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003); *Pierce County* v. *Guillen*, 537 U.S. 129 (2003).

it cite the CISG in either arguing that the case should not be dismissed or appealing the dismissal. But those facts (none of which respondent acknowledges) just indict respondent's newfound claim that this case is governed by the CISG. The relevant point for this Court's purposes is that the question presented was both "pressed in" the parties' Rule 28(j) submissions and "passed upon" by the Ninth Circuit in its ruling. See *Verizon Communications* v. *FCC*, 535 U.S. 467, 530 (2002) ("Any issue 'pressed or passed upon below' by a federal court is subject to this Court's broad discretion over the questions it chooses to take on certiorari * * *.") (citations omitted). Further, the Ninth Circuit finally and clearly resolved the question and denied rehearing en banc when fully apprised of the contrary authority in other jurisdictions, such that there is no realistic prospect that it would reach a different result in a later case. The fact that a court of appeals decides a fundamental issue *sua sponte* and without paying due regard to contrary authority is hardly a ground that should *insulate* its decision from review.[6]

Respondent's remaining argument that this case is an inappropriate case to decide the question presented – that the forum selection clause in the invoices was written in French (see BIO 1, 2 n.2, 4) – is silly, which is no doubt why the court of appeals did not accept it. As a matter of law, it is settled that the failure to read or understand a document (including one in a foreign language) does not excuse a party from complying with the document's terms. See *MCC-*

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[6] There is neither a jurisdictional nor a practical basis for respondent's claim (BIO 11) that certiorari should be denied because the *district court* did not discuss the CISG (no doubt because, as noted, respondent had not invoked it). The court of appeals categorically held that "the contract for the sale of corks did not contain the forum selection clauses in [petitioners'] invoices" and that the forum-selection clauses were therefore invalid (Pet. App. 6a); nothing that the district court said would further illuminate the question presented here.

Marble Ceramic Center, Inc. v. *Ceramica Nuova d'Agostino, S.P.A.*, 144 F.3d 1384, 1387 n.9 (CA11 1998), cert. denied, 526 U.S. 1089 (1999). As a matter of fact, the initial discussions between the parties were conducted in French. See ER-176. Moreover, not only is French one of the national languages of Canada, respondent's domicile, but respondent also produces its own marketing materials in French. See, *e.g.*, *La Famille Bosc Vous Accueille*, *available at http://www.chateaudescharmes.com/francais_welcome/welcome.html* (visited Oct. 31, 2003). Respondent thus notably does not contend that it did not understand the clause, which appeared on both the front and back of the invoices.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition, certiorari should be granted.

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No. 03-465

IN THE

Supreme Court of the United States

Sabate S.A. and Sabate U.S.A., Inc.,
Petitioners,

v.

Chateau des Charmes Wines Ltd.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

SUGGESTION OF MOOTNESS

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SUGGESTION OF MOOTNESS

Petitioners Sabate S.A. and Sabate U.S.A., Inc. respectfully suggest that the appeal underlying their petition for certiorari is moot as a result of the dismissal of this action by the district court. See Nov. 10, 2003 Opinion (filed contemporaneously herewith), at 1-14.

1. The petition arises from a complaint filed by respondent Chateau des Charmes Wines Ltd. against petitioners in the federal district court for the Northern District of California. Respondent alleged state law claims for breach of express warranty, breach of implied warranties, breach of contract, misrepresentation, strict liability/negligence, and violation of California's false advertising and deceptive practices statutes.

The district court initially dismissed the complaint based on a forum selection clause in the parties' written contracts. See Pet. App. 7a-17a.

On respondent's appeal, the Ninth Circuit reversed. The court of appeals *sua sponte* held that the contracts were governed by a treaty to which the United States had subscribed, the United Nations Convention on Contracts for the International Sale of Goods (CISG). See *id.* 3a-4a. The court further held that, under that treaty, the material terms of the written contracts were not part of the parties' agreement. See *id.* 5a-6a.

The petition for certiorari challenges the Ninth Circuit's determination that the validity of the forum selection clause is governed by the CISG (see Pet. 5-6), as well as its determination that the material written terms are invalid under the CISG (see *id.* 7-12).

2. During the pendency of the petition, proceedings have continued in the district court. On November 10, 2003, the district court granted petitioners' motion to dismiss the complaint on the ground of forum non conveniens. See Opinion, at 1, 14. The district court specified that respondent

could pursue its dispute with petitioners by filing a new action in the courts of Canada or France. *Id.* at 14.

3. The instant appeal is moot. As the case stands, respondent's complaint has been dismissed. Petitioners obviously have nothing to gain through the appeal that is the subject of the petition for certiorari, which ultimately seeks the same result. Relatedly, respondent obviously cannot prevail on its now-dismissed complaint. The district court's dismissal order therefore necessarily renders the proceedings in this Court moot. "To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain." *Sears, Roebuck & Co.* v. *Carpet, Linoleum, Soft Tile & Resilient Floor Covering Layers*, 397 U.S. 655, 657 (1970) (numerous citations omitted).

4. Because the petition presents a substantial legal question, this Court should not merely deny certiorari but instead should act on the petition in a fashion that accounts for the fact that the case has become moot. "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Indeed, "it is the duty of the appellate court to set aside the decree below and to remand." *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267 (1936).

Two factors make that course particularly appropriate in this case. *First*, a principal reason for vacatur is that the party deprived of the opportunity to secure further review (here, petitioners) not be prejudiced by the invocation of the decision against it in later litigation. "Vacatur 'clears the path for future relitigation' by eliminating a judgment the loser was stopped from opposing on direct review." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71 (1997) (quoting *Munsingwear*, 340 U.S. at 40). That generally abstract prospect is *concrete* in this case. Respondent has already

advised petitioners that it will regard the Ninth Circuit's holding with respect to the CISG as binding when it files a new complaint in Canada or France.

Second, the judgment has adverse consequences well beyond the parties to this single case. The Ninth Circuit held that, in the frequently recurring circumstance in which a purchaser of goods in international commerce places an oral order, subsequent material terms in a writing by the seller are unenforceable. See Pet. App. 5a-6a. That rule invalidates forum selection and arbitration clauses in invoices and letters of confirmation that follow oral orders. As discussed in the petition, that holding is disruptive to commerce because the contrary rule applies not only in other CISG signatory states but also in the United States with respect to domestic sales. See Pet. 10-12; *id.* 6-7.

Such a dramatic departure from practice and precedent ought not be sanctioned lightly. Yet, as respondent emphasized in opposing certiorari, the Ninth Circuit reached its decision *sua sponte*. See BIO 10-11. Respondent contended that this fact makes this case an inappropriate vehicle in which to decide such an important question. Although petitioners pointed out that the fact that the court of appeals decided the issue without full consideration was hardly a ground for insulating its ruling from review (see Cert. Reply 8-9), the relevant point is that both petitioners and respondent agree that the court of appeals decided the case without the benefit of thorough analysis by the parties.

5. Ordinarily, in these circumstances, the Court vacates the judgment and remands the case with instructions to dismiss the case as moot. See *Munsingwear*, *supra*. Petitioners acknowledge, however, that a circumstance could arise in the case in which vacatur could prejudice respondent unfairly. It is possible that respondent will persuade the district court or the Ninth Circuit to reverse the order of dismissal. That is doubtful, given that the appeal will be decided on an abuse of discretion standard. See *American*

Dredging Co. v. *Miller*, 510 U.S. 443, 455 (1994); *Creative Tech., Ltd.* v. *Aztech Sys. PTE*, 61 F.3d 696, 699 (CA9 1995). Indeed, the Ninth Circuit has reversed in only two of twenty-four forum non conveniens appeals in the past ten years.[1]

Nonetheless, reversal is a hypothetical possibility, and it would render the case no longer moot. The appropriate course in that circumstance is for this Court to remand the case to the court of appeals for consideration of the question of mootness. See, *e.g.*, *United States* v. *U.S. West, Inc.*, 516 U.S. 1155 (1996); *Sylvester* v. *Bryant*, 516 U.S. 1105 (1996); *MCI Telecomms. Corp.* v. *Credit Builders of Am.*, 508 U.S. 957 (1993); *Continental Cas. Co.* v. *Fibreboard Corp.*, 506 U.S. 948 (1992); *Dep't of Transp.* v. *Air Transp. Ass'n of Am.*, 498 U.S. 1077 (1991). If some further development renders the case non-moot, the Ninth Circuit will be in a position to account for that fact and reinstate its judgment if appropriate. See, *e.g.*, *MCI Telecomms. Corp.* v. *Credit Builders of Am.*, 2 F.3d 103, 103 (CA5 1993) ("The Supreme Court granted certiorari, vacated our decision, and remanded the case with instructions [to] 'consider the question of mootness.' After considering this issue, we conclude that the controversy is not moot, and reinstate our previous opinion."), *on remand from MCI Telecomms.*, *supra*.

CONCLUSION

For the foregoing reasons, the judgment should be vacated and the case remanded for the court of appeals to consider whether the case is moot.

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[1] The mere possibility of later reversal does not, of course, render the case non-moot. See *Bd. of License Comm'rs* v. *Pastore*, 469 U.S. 238, 240 (1985) (per curiam) ("[S]peculative contingencies afford no basis for our passing on the substantive issues [the petitioner] would have us decide.") (internal quotations and citations omitted).

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